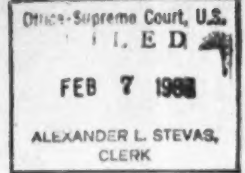


82-6194



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October, Term, 1982

H. WESLEY COPELAND,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I

Was the Petitioner's right to an impartial jury under the Sixth and Fourteenth Amendments violated by the dismissal for cause of a juror who never stated that he was irrevocably opposed to capital punishment?

II

Do the Eighth and Fourteenth Amendments require that a jury be given instructions which provide guidance as to what may legally be considered as mitigation in the sentencing phase of a capital trial under Witherspoon v. Illinois, 391 U.S. 510 (1968)?

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I. The Court should grant the writ to determine whether, in this capital case, the trial court's dismissal for cause of a juror who never stated that he was irrevocably opposed to capital punishment constituted a contravention of the requirements set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968) and a violation of the Eighth and Fourteenth Amendments. 7

II. The Court should grant the writ to consider whether the Sixth and Fourteenth Amendments require that a jury in the sentencing phase of a bifurcated capital trial be given instructions which provide guidance as to what may legally be considered as mitigation in light of this Court's rulings in Lockett v. Ohio, 438 U.S. 586 (1980). 13

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APPENDIX

State v. H. Wesley Copeland, et al, No. 21808,
slip op. (S.C. November 10, 1982)

Federal Statute:

28 U.S.C. §1257 (3). 1

State Statutes:

S.C. Code §16-3-20 2, 14
S.C. Code §16-3-25 4

Constitutional Provisions:

U.S. Const. Amend. VI. passim
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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

Petitioner H. Wesley Copeland prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported in State v. H. Wesley Copeland, et al, No. 21808, slip op. (S.C. November 10, 1982) and is attached hereto as the Appendix to this Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on November 10, 1982. Thereafter timely petitions for rehearing and for a stay of execution were filed on November 22, 1982. On December 11, 1982 the South Carolina Supreme Court granted petitioners request for a stay of execution however the petition for rehearing was denied. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having arrested below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent

part:

"trial, by an impartial jury;"

the Eighth Amendment to the Constitution of the United States, which provides in pertinent part:

"nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

"No state shall... deprive any person of life, liberty or property without due process of law..."

2. This case also involves the following provisions of the Code of Laws of South Carolina:

S.C. Code §16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

- (1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;
- (2) Murder was committed by a person with a prior record of conviction for murder;
- (3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
- (5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
- (7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
- (b) Mitigating circumstances:
 - (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
 - (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
 - (3) The victim was a participant in the defendant's conduct or consented to the act;
 - (4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
 - (5) The defendant acted under duress or under the domination of another person;
 - (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
 - (7) The age or mentality of the defendant at the time of the crime;
 - (8) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor.

Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * *

S.C. Code §16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

- (1) Affirm the sentence of death; or
- (2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same

or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

STATEMENT OF THE CASE

Petitioner was tried and convicted, along with his co-defendant Sammy David Roberts, for the kidnapping and murder of three gas station attendants. In addition they were convicted of one count of armed robbery. In accordance with South Carolina's capital sentencing statute, S.C. Code §§16-3-20 et seq., which is closely patterned after the Georgia death penalty statute considered by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), a separate sentencing proceeding was conducted before the trial jury at which the state was required to prove beyond a reasonable doubt the existence of at least one statutory aggravating circumstance as a precondition of the imposition of the death penalty. The state elected to present no additional evidence at the sentencing phase of petitioner's trial choosing instead to rely on the evidence presented in the guilt phase to support its position that the statutory aggravating circumstances of kidnapping and armed robbery had been proved beyond a reasonable doubt.

The jury subsequently recommended the imposition of the death penalty for all three murder convictions. The Petitioner was then sentenced to twenty-five years imprisonment for the armed robbery conviction and three life sentences for the three kidnapping convictions. All said sentences to run consecutively and, in accordance with the jury's recommendation, the Petitioner was sentenced to death by electrocution for each of the three murder convictions.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

I. During the trial court's qualification of the jury in Petitioner's case seven jurors were excused because of their position concerning the imposition of the death penalty. Petitioner took exception to the dismissal of the juror Anthony Gadsden on the ground that the jury had not expressed irrevocable opposition to the imposition of capital punishment and that therefore his dismissal for cause on the basis of his beliefs concerning the death penalty was impermissible under Witherspoon v. Illinois, 391 U.S. 519 (1968).

On appeal to the South Carolina Supreme Court following the imposition of three death sentences, petitioner again argued that the trial court improperly dismissed the juror Anthony Gadsden in violation of the principles set forth in Witherspoon v. Illinois, supra. [Tr. 3399, Exception VII]. Petitioner argued that the voir dire of this prospective juror when reviewed in its entirety clearly illustrated that he "was not 'irrevocably committed, before the trial [began], to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.'" State v. Copeland, et al, Brief of Appellant at 3, quoting Witherspoon v. Illinois, 391 U.S. at 422 n.1. The Supreme Court of South Carolina rejected Petitioner's position stating

that the "questioning process of Mr. Gadsden, viewed in its entirety, clearly demonstrates his unwillingness to vote for the death penalty."
State v. Copeland, et al, No. 21808 slip op. 6
 (S.C. November 10, 1982).

II. Prior to the sentencing phase of the Petitioner's trial he filed numerous requests for jury instructions including a request for an instruction on mitigating evidence which would have informed the jury that they were legally authorized to consider any evidence presented in this case which "tend[ed] to show that the Defendant deserve[d] a sentence of life imprisonment rather than death." [Tr. 3211-12; Pretrial Motion No. 57]. The request to charge was denied. [Tr. 3074]. On appeal to the Supreme Court of South Carolina the Petitioner

argued that the trial court violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution by denying his request that the jury be instructed orally and in writing that it could consider only mitigating circumstances supported by the evidence, regardless of whether the circumstances were set out by statute. [Tr. 3403; Exception No. XVIII]. The Supreme Court of South Carolina, in affirming the death sentences, rejected the Petitioner's position stated:

Appellants... argue the trial judge's charge and written statutory instructions concerning mitigating circumstances were insufficient to alert the jurors that they could consider mitigating circumstances other than the nine statutory mitigating circumstances.

Section 16-3-20(C) of the Code requires the trial judge to instruct the jury to consider 'any mitigating otherwise authorized or allowed by law and any... statutory.... mitigating.... the trial judge fully complied with this provision.'

State v. Copeland, et al, No. 21808 slip op. 10 (S.C. November 10, 1982).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER, IN THIS CAPITAL CASE, THE TRIAL COURT'S DISMISSAL FOR CAUSE OF A JUROR WHO NEVER STATED THAT HE WAS IRREVOCABLY OPPOSED TO CAPITAL PUNISHMENT CONSTITUTED A CONTRAVENTION OF THE REQUIREMENTS SET FORTH IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Seven potential jurors were disqualified from participating in Petitioner's trial on grounds relating to their views concerning capital punishment. One of the seven answered the questions by the Court and Counsel during voir dire in a manner that clearly did not warrant his disqualification under Witherspoon v. Illinois, 391 U.S. 510 (1968). The dismissal of the juror Anthony Gadsden for cause clearly constituted a violation of the Petitioner's right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution inasmuch as Gadsden never stated that he was irrevocably opposed to the imposition of a death sentence.

The standard set by this Court in Witherspoon allows the State to exclude only those veniremen who

ma[k]e unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at 391 U.S. 515, n.9. (emphasis in original).

Anthony Gadsden was initially examined by the trial court in a brief colloquy which included the following discussion of the death penalty:

Q. [F]irst let me ask you, have you formed an opinion concerning the death penalty?

A. No, sir.

Q. If the evidence justified it, and if you felt that it was proper, could you vote to impose the death penalty?

A. No, sir.

Q. Could you vote for the death penalty under any circumstances?

A. No, sir.

Q. Under no circumstances?

A. No, sir.

[Tr. 1000, l. 22 - Tr. 1001, l. 14]. While these initial questions and responses appeared to indicate absolute resolve on the part of this potential juror with regard to the issue of capital punishment. However, subsequent exchanges between this juror and both defense counsel and the prosecution reveal that Anthony Gadsden was not "irrevocably committed" to vote against the imposition of the death penalty.

When examined by defense counsel the juror in question answered inquiries concerning his ability to consider the imposition of capital punishment in a manner which revealed confusion and uncertainty about his ability to recommend the imposition of the death penalty. While his answers to certain questions reflected conscientious did not reflect an absolute unwillingness to consider the penalty as required by the laws of the State of South Carolina. The following exchange illustrates Petitioner's position:

- Q. When [the] Judge asked you a question a moment ago, I think you said that you didn't much believe in the death penalty?
- A. No.
- Q. Is that a religious conviction or what?
- A. Well, in my opinion, I can't, you know, say to give somebody death in the circumstances.
- Q. Okay. The kind of case that we are doing here is the death penalty case. Now, in a death penalty case in South Carolina, we have a two-part trial. What we do is we call witnesses up and they sit [in] that chair, and you would be sitting over here as a member of the jury, then what would happen, the jury would go back to the juryroom and they would determine one of two things, guilty or innocent. It wouldn't have nothing to do with punishment yet. They just determine whether or not someone is guilty or someone is innocent. Could you participate in that part of the trial, do you think?
- A. No.
- Q. Why not?
- A. I wouldn't feel right. It would be on my conscience.
- Q. Well, all you would be determining is whether or not the man is guilty of the crime, you wouldn't be having any hand in the punishment at that stage.
- A. Well, I don't agree on that, on that part.
- Q. Okay. If a man was accused of murdering somebody and there was just absolutely no reason for it whatsoever, just meanness, somebody paid to kill somebody. Could you bring back the death penalty in a situation like that?
- A. No.
- Q. Okay. Could you even consider it?
- A. Maybe.
- Q. Okay. Are there any circumstances, I mean, you know, just any circumstances--- I don't want to sit here and give you a horrible example after horrible example of awful people, but are there any people that you could think of that if they committed a crime--- could you think back in time that could have really deserved the death penalty?
- A. Well, I couldn't really tell you.

[Tr. 1002, 1. 12 - Tr. 1004, 1. 2]. Later counsel for Petitioner's co-defendant questioned the juror further:

- Q. [D]o you think you could give the party a fair and impartial trial to determine whether or not they were just guilty or innocent of the crime that they are charged with?
- A. I really don't know.
- Q. You don't know?
- A. No.
- Q. Would you listen to all the evidence presented at that first trial where you are just going to determine whether or not they were guilty or innocent?
- A. Maybe I could.
- Q. Maybe you could?
- A. Uh huh.

[Tr. 1004, 1. 12 - Tr. 1005, 1. 3] And later:

- Q. [C]ould you consider the imposition of the death penalty or life imprisonment?
- A. That would be a very hard decision to do.
- Q. I know it's not an easy decision but would you be able to sit there and given these instructions by the judge, could you weigh these things out in your mind and consider what would be the proper punishment?
- A. I don't think so.
- Q. You don't think so.
- A. No.

[Tr. 1007, lines 2-14]. Continuing through a review of the lengthy exchanges between counsel and this juror the following critical colloquy appears:

- Q. After considering these aggravating and mitigating circumstances, do you feel that you would automatically vote for life?
- A. Maybe.
- Q. You said maybe, would that mean that you would consider either life or death before making your decision?
- A. Well, I would say in prison first before I say death.
- Q. If you had a choice?

A. Right.

Q. And in order to make that choice you would have to make an intelligent consideration, is that correct?

A. Right.

Q. Suppose and we are talking about any case, not this case particularly, suppose these aggravating or bad circumstances that the State has to prove to you, suppose they show that it happened in a robbery, kidnapping and a rape, let's say we are talking about a small 12 year old girl. Somebody went out and took her and raped her, killed her and mutilated her body and suppose the judge told you that even with those aggravating circumstances, even if you didn't find any mitigating circumstances that you still had to consider both life and death?

A. I had rather give them life.

Q. You had rather give them life?

A. Right.

Q. But even under the circumstances where they take, let's say, a 12 year old girl out and rape her and kill her and mutilate her body, would you consider the imposition of the death penalty in a case like that?

A. Yes.

Q. Would you give it strong consideration before you vote?

A. Yes.

Q. You wouldn't automatically vote for life?

A. No.

[Tr. 1007, 1. 12 - Tr. 1008, 1. 21].

Witherspoon, supra, clearly permits the exclusion of jurors who are "irrevocably committed" to voting against the imposition of a death sentence and who would accordingly "automatically" vote for a life sentence. The trial court erred in determining that this juror could properly be excluded under this strict standard.

The requirements set out by this Court in Witherspoon have been repeated in several subsequent cases. Adams v. Texas, 448 U.S. 38 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969). In all these

cases this Court recognized the state's authority to exclude veniremen for a jury on the ground that they would "automatically" vote against the death penalty while maintaining that the improper exclusion of even one juror on Witherspoon grounds removes from the state the power to impose a sentence of death.

It is clear from the record that this juror was excluded from service on the basis of the first prong of Witherspoon: that he would automatically vote against imposition of the death penalty regardless of the evidence presented. At the conclusion of the examination of Anthony Gadsden the trial judge stated "[I] am going to excuse you from further service. There's nothing wrong with your views, but you have unequivocally and right length stated that you are opposed to the death penalty and there is nothing wrong with that view. A lot of people share that view but under our laws, that would disqualify you." [Tr. 109, lines 4-9].

This case presents the issue of whether or not the state courts may exclude from jury service in capital cases potential jurors who have general reservations about the imposition of the death penalty. The Petitioner would argue that the death sentences in his case cannot be constitutionally carried out inasmuch as "the jury that imposed or recommended [them] was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expresses conscientious or religious scruples against its infliction." Witherspoon at 391 U.S. at 521-522.

II. THE COURT SHOULD GRANT THE WRIT TO CONSIDER WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A JURY IN THE SENTENCING PHASE OF A BIFURCATED CAPITAL TRIAL BE GIVEN INSTRUCTIONS WHICH PROVIDE GUIDANCE AS TO WHAT MAY LEGALLY BE CONSIDERED AS MITIGATION IN LIGHT OF THIS COURT'S RULINGS IN LOCKETT V. OHIO, 438 U.S. 586 (1980).

Prior to the jury's deliberations in the sentencing phase of the Petitioner's trial, ^{he filed} a written request for an instruction on mitigating circumstances which asked that the jury be instructed orally and in writing that it could consider several enumerated non-statutory mitigating circumstances and any other evidence in the record, but not listed in said motion, which tended to show that the Appellant deserved a sentence of life imprisonment rather than death. [Tr. 3211-3212; Pretrial Motion No. 57]. Said request to charge was denied. [Tr. 3074]

At the beginning of the trial courts charge in the sentencing phase the jury was instructed that:

In arriving at your recommendation, you may consider any mitigating circumstances otherwise authorized or allowed by law; and you may consider certain so called statutory aggravating and mitigating circumstances which are supported by the evidence.

[Tr. 3075, lines 17-21]. Further into the court's charge the following instruction is found:

In addition to considering the statutory aggravating circumstances, you may also consider each alleged statutory mitigating circumstance supported by the evidence. Now, what is a statutory mitigating circumstance? A statutory mitigating circumstance is a fact, detail, instance or occurrence which the General Assembly of South Carolina has declared by Statute would render less severe, that is, mitigate the offense of murder when that fact, detail, instance or occurrence accompanies an act of murder. A statutory mitigating circumstance is one recognized by Statute as a circumstance which, in fairness and mercy, may be considered as extenuating or as reducing the degree or moral culpability for the commission of the act of murder. /A mitigating circumstance, it should be noted, would not constitute either justification or excuse for the offense in question. /Such a circumstance would simply lessen one's guilt, that is make him less blameworthy or less culpable. Before you can recommend the imposition of a life sentence, it is not necessary -- I repeat -- it is not necessary for you to find beyond a reasonable doubt the existence of an alleged statutory mitigating circumstance.

[Tr. 3078, l. 17 - Tr. 3079, l. 12] Later in the charge the jury was orally instructed on the statutory mitigating circumstances contained in S.C. Code §16-3-20(C):

What are the statutory mitigating circumstances you may consider here for these defendants? One, the defendant has no significant history of prior criminal conviction involving the use of violence against another person. Two, the murder was committed while the defendant was under the influence of mental or emotional disturbance. Three, defendant was an accomplice in the murder committed by another person and his participation was relatively minor. Four, the defendant acted under duress or under the domination of another person. Five, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Sixth, the age or mentality of the defendant at the time of the crime. Seven, the victim was a participant in the defendant's conduct or consented to the act. Eight, the defendant was provoked by the victim into committing the murder. Nine, the defendant was below the age of eighteen at the time of the crime.

Now, ladies and gentlemen, please note that the statutory mitigating circumstances which you are authorized to consider in this case, like the statutory aggravating circumstances which you may consider here, will be submitted to you in writing; and they are set forth in the document entitled statutory instructions. That document, as I have stated, will be with you in the jury room when you retire.

[Tr. 3080, 1. 15 - Tr. 3081, 1. 14]. The jury was not further instructed on the provision of S.C. Code §16-3-20(C) which provides:

The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law....

The written charge included the nine statutory mitigating circumstances but did not contain the general provision cited above. [Tr. 3107] Petitioner submits that the denial of the requested instruction and the insufficiency of the charge issued orally and in writing violated the Eighth and Fourteenth Amendments to the United States Constitution.

In Lockett v. Ohio, 438 U.S. 586 (1978) this Court held that the sentencing authority may "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death." Id at 604 (emphasis in original). This Court recently emphasized its continued adherence to the holding in Lockett. In Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982), this Court once again held that the jury in a capital case may not be precluded from considering any relevant mitigating factor.

This case presents the issue of whether or not the Eighth and the Fourteenth Amendments are violated when the jury in a capital case is insufficiently instructed as to the state of the law concerning what evidence may properly be considered as mitigation in the decision between a life sentence and the imposition of a death sentence. The instructions ultimately issued by the trial court, orally and in writing, were at best misleading. The jury was initially, orally instructed that they could consider "any other mitigating circumstances otherwise authorized or allowed by law". This language did not appear in the written charge. The jury was never informed what the law does authorize or allow jurors to consider as mitigation. Petitioner would therefore argue that the instruction given was insufficient to comply with this Court's ruling in Lockett, supra. It is unreasonable to expect a jury to take the jump in logic from "any...authorized or allowed by law" and "any" period. The modifying language of S.C. Code §16-3-20(C) when used as an instruction without further explanation and instruction, constitutionally restricts the jury's deliberation.

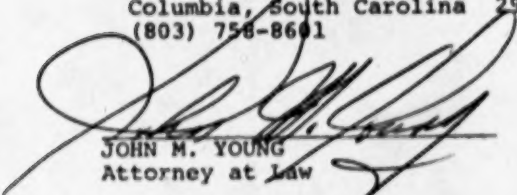
CONCLUSION

Petitioner prays that his petition for writ of certiorari be granted.

Respectfully submitted,


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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,
v.
H. Wesley Copeland and
Sammy David Roberts, Appellants.

Appeal From Berkeley County
Marion H. Kinon, Judge

Opinion No. 21808
Filed November 10, 1982

AFFIRMED

Appellate Defender John L. Sweeny, Assistant Appellate Defenders David W. Carpenter and Tara D. Shurling, all of S. C. Commission of Appellate Defense; and David I. Bruck, all of Columbia; and Peter F. Them, II, and John G. Frampton, both of Summerville, for appellants.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbs and Assistant Attorney General Lindy P. Funkhouser, all of Columbia; and Solicitor Charles M. Condon, of Charleston, for respondent.

GREGORY, A.J.: Appellants Wesley Copeland and Sammy Roberts were convicted of armed robbery, kidnapping, and murder. Both received sentences of twenty-five years, life, and death for the respective offenses. They appeal, asserting numerous exceptions. We consolidate their appeals with our mandatory review pursuant to S. C. Code Ann. § 16-3-25 (Cum. Supp. 1981). We vacate their life sentences for kidnapping, and otherwise affirm.

Sometime around midnight, June 18, 1980, Bill Spain and Butch Krause were closing for the night the service station where they worked. They were robbed of One Thousand Ninety-Six and 03/100 (\$1,096.03) Dollars, taken from the station in North Charleston to a secluded spot in Berkeley County, and shot to death. In the early morning hours of June 19, 1980, Louis Cakley, a service station attendant in Moncks Corner was robbed of Four Hundred Twenty-Six and 11/100 (\$426.11) Dollars, taken to another secluded spot in Berkeley County, and shot to death.

The bodies of the three men were found several days after the murders. Investigations began immediately and continued for several months. On October 24, 1980, upon information given to the authorities by Danny Ray Coker, an accomplice in these crimes, appellants were arrested for the armed robbery, kidnapping, and murder of the three men. Coker was granted immunity from prosecution in exchange for his testimony.

First, appellants challenge the constitutionality of the South Carolina death penalty statutes. We held these statutes constitutional in *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981) and *State v. Coolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980), cert. denied, 101 S.Ct. 616 (1981).

Next, appellants contend imposition of the death penalty for the crime of murder while in the commission of kidnapping violates the Eighth Amendment prohibition against arbitrary infliction of the death penalty because the statutory definition of kidnapping is overbroad and ambiguous. We held in *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981) and *State v. Smith*, 275 S.C. 163, 268 S.E.2d 276 (1980), the kidnapping statute is constitutional, not overbroad and ambiguous. This exception is without merit.

Appellant Roberts argues it is unconstitutional to sentence a person to death without finding that he caused or intended another's death. He contends this offends both the Eighth Amendment mandate that any decision to impose the death penalty be based on reason rather than caprice and the Cruel and Unusual Punishment Clause of the Eighth Amendment.

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Recently, the U. S. Supreme Court reversed a Florida Supreme Court judgment upholding the death penalty because there was no proof the codefendant killed, attempted to kill, intended or contemplated that life would be taken. *Enmund v. Florida*, 50 U.S.L.W. 5087 (June 29, 1982).

We think imposition of the death penalty in this case does not offend the standards set out in *Enmund*, supra. The evidence is clearly sufficient to justify the death penalty. It shows Roberts did, in fact, cause Cakley's death, and, while not the triggerman in the two earlier murders, he was present the entire time the crimes were committed, and he held a gun on at least one of the two victims and forced him to lay on the ground whereupon both men were shot to death. Roberts cannot seriously contend that he did not intend or contemplate that life would be taken.

We do not find the jury's recommendation to be the result of passion, prejudice, or any other arbitrary factor, nor do we find imposition of the death penalty unconstitutional in Roberts' case.

Next, appellants argue the trial judge erred in refusing to change venue to another county.

A change of venue is addressed to the judicial discretion of the trial judge, and his decision will not be disturbed absent a showing of an abuse of that discretion. *State v. Valenti*, 265 S.C. 380, 218 S.E.2d 726 (1975). Where the trial judge bases his ruling on adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted with outside influence will not be disturbed absent extraordinary circumstances. *State v. Fowler*, 266 S.C. 203, 222 S.E.2d 497 (1976); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379, cert. den., 409 U.S. 1077, 93 S.Ct. 691, 34 L.Ed.2d 666 (1972).

State v. Neeley, 271 S.C. 33, 244 S.E.2d 522, 524 (1977). Appellants must prove actual juror prejudice. *State v. Plath*, supra; *State v. Goolsby*, supra; *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979). The record shows maximum precaution by the trial judge to ensure elimination of veniremen who may have been prejudiced by pretrial publicity and the absence of prejudice on the part of the jurors. Appellants' motions for change of venue were properly denied.

Next, appellants argue the trial court erred in denying their motions for continuance. A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon will not be disturbed absent a showing of abuse of discretion. *State v. Brooks*, 271 S.C. 355, 247 S.E.2d 436 (1978). We find no abuse of discretion on the part of the trial judge.

Appellants further argue the trial court erred in disqualifying jurors who oppose the death penalty. This issue was resolved adversely to appellants in *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Linder*, supra; *State v. Goolsby*, supra; *State v. Tyner*, supra.

Next, appellants argue the trial court erred in disqualifying Anthony Gadsden, a member of the venire, because of his strong feelings against the death penalty where the record did not show he was irrevocably committed to vote against imposition of the death penalty. The questioning process of Mr. Gadsden, viewed in its entirety, clearly demonstrates his unwillingness to vote for the death penalty. The questioning process was consistent with the standards established in *Witherspoon v. Illinois*, 281 U.S. 510 (1968). Thus, the trial court did not err in disqualifying Mr. Gadsden for cause.

Appellants next argue the trial court erred in qualifying a venireman who indicated he would impose the death penalty in every case of aggravated murder. The questioning process of this venireman clearly demonstrates he would not impose the death penalty in every case of aggravated murder, but would follow the trial court's instructions and bring in a life sentence if he thought it was proper. This exception is meritless.

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Appellants argue the solicitor's closing argument at the first phase of the trial was improper. In his closing argument, the solicitor stated, "[Danny Ray Coker] is going to prison for at least -- I submit to you for somewhere around twenty years." Allegedly, this statement is not supported by evidence established at trial and attempts to bolster the credibility of the State's key witness by distracting the minds of the jurors from the fact that Coker received complete immunity from prosecution in exchange for his testimony.

Throughout the record is testimony that Coker will be sentenced to one - twenty (1-20) years for various crimes he committed in Sumter. We do not see how the fact that Coker will be sentenced for other crimes he committed could in any way bolster his credibility. In addition, the solicitor discusses the immunity agreement with Coker in the next paragraph of his argument. Thus, rather than distracting the minds of the jurors from the fact that Coker is receiving complete immunity from prosecution for his part in these murders, the solicitor calls this fact to their minds.

The trial judge has wide discretion in dealing with the range and propriety of the solicitor's argument to the jury, and ordinarily his rulings on such matters will not be disturbed. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). We find no error.

Next, appellant Copeland argues the trial judge improperly commented on the facts during his instruction on the law concerning the presumption of innocence, and thereby injected his opinion thereof. The instruction complained of is as follows:

The presumption of innocence accompanies the defendant throughout the trial of this case and, when you go to the jury room to deliberate, it follows the defendant there with you and it entitles him to a verdict of not guilty at your hands until such time as you are convinced that the State of South Carolina has proven to your satisfaction that the defendant is guilty beyond a reasonable doubt. And if the state has satisfied you of the defendant's guilt beyond a reasonable doubt, then that presumption of innocence disappears; and you would write a verdict that speaks the truth of this controversy. (Emphasis added.)

No reasonable interpretation of this portion of the trial judge's charge can result in the conclusion that he commented on the facts and injected his opinion as to the guilt of appellant. This exception is frivolous and without merit.

Appellants next argue the trial judge erred in defining reasonable doubt as "a doubt that is well founded in reason" and "a substantial doubt." The trial judge's definition of reasonable doubt is well within the guidelines set by this Court. State v. Butler, ___ S.C. ___, 290 S.E.2d 1 (1982); State v. Griffin, ___ S.C. ___, 285 S.E.2d 631 (1981). There is no error.

Appellant Copeland argues the trial judge erred in refusing to instruct the jury that their sentencing recommendation would be binding upon the trial judge. We resolved this issue in State v. Linder, *supra*, at 338-339.

Use of the word "recommend" by the trial judge or solicitor is not per se suspect. Under the statute "recommendation" is the term applied to the jury's function at this phase of the trial. To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors' responsibility at this phase of the trial.

We find no error.

Appellants argue the trial court erred in failing to instruct the jury that a police officer's testimony concerning a witness's statement prior to trial which is inconsistent with that witness's statement made at trial, is to be considered solely for impeachment purposes. Lieutenant Nettles of the Berkeley County Sheriff's Department testified that Bilangia Thomas, who was in a jail cell next to Coker, told him the guns used in the murders of the three men were buried behind Wesley Copeland's trailer. Bilangia Thomas denied at trial telling Lt. Nettles anything concerning the guns. We held

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in *State v. Warren*, ___ S.C. ___, 284 S.E.2d 355 (1981) that "when a prior inconsistent statement is introduced to impeach a witness, the court, upon request, must instruct the jury that it can consider such evidence for the purpose of impeachment only...." (Emphasis added). Here, appellants did not request the trial judge to instruct the jury to consider Lt. Nettles' testimony only for impeachment purposes.

Heretofore, South Carolina has followed the traditional rule that testimony of inconsistent statements is admissible only to impeach the credibility of the witness. Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination. We quote with approval the reasoning by the Supreme Court of Georgia in *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717, 721 (1982), in adopting this new prior inconsistent statement rule:

[C]ommentators... suggest that the oath is not as strong a guaranty of truth as once it may have been, and the requirements that the jury observe the declarant and that the defendant have an opportunity to cross-examine are met where the declarant takes the stand and is subject to cross-examination. The assertion by a person that the declarant made a prior statement is not itself heresay, and the jury can determine the credibility of the witness on that point. With respect to the truth of the prior statement, the jury has the opportunity to observe the declarant as he may repudiate or vary his former statement, and as he is cross-examined. Thus, the jury can determine whether to believe the present testimony, the prior testimony - or neither.... [P]rior statements... are made closer in time to the event in question, when memories are fresher, and... the traditional rule requires the courts to give unrealistic and confusing instructions to the jury. See 3A Wigmore, Evidence (Chadbourn rev.) § 1018; McCormick, Handbook of the Law of Evidence, 2d ed., § 251, Morgan, Heresay, Dangers and the Application of the Hearsay Concept, 62 Harv. L.R. 177, 192 et seq. (1948).

We believe the adoption of this rule will more effectively aid in the discovery of truth, and more adequately insure the freedom of the innocent and the conviction of the guilty.

Appellant Copeland argues the trial court should have allowed introduction in the sentencing phase of the results of the state's key witness's polygraph examination. Copeland contends the examination revealed deception in some aspects of Coker's story, and this would be relevant in the sentencing phase to show mitigating circumstances.

Generally, the results of polygraph examinations are inadmissible because the reliability of the polygraph is questionable. We decline to create an exception to this general rule in order to allow admission of the results in the sentencing phase of this bifurcated trial for the same reason that it is generally inadmissible - its questionable reliability for scientific accuracy.

Appellant Roberts argues the trial judge chilled appellant's right to testify at the sentencing phase of the trial by allegedly advising him erroneously that his testimony would be admissible in another court if there were a new trial. In response to Roberts' request for advice as to whether his testimony at the sentencing phase could be used against him at a new trial, the trial judge stated:

"All right, sir. I cannot tell Mr. Roberts whether to take the stand or not. That is a decision that he will have to make. Of course, as you know, if there is a new trial, that record would be admissible in another court."

In *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890, 894 (1979), we stated:

Each accused, with the assistance of counsel, makes this decision [not to testify] as a part of his trial strategy.

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Under the first principle of ethics and justice, a defendant who secures a ruling of the court, albeit erroneous, should not be permitted to profit...from the court's assent to an improper trial strategy.

Roberts relies on *State v. Adams*, ___ S.C. ___, 283 S.E.2d 582 (1981), to support his position that his testimony at the sentencing phase cannot be used against him in determining his guilt or innocence at a new trial. Roberts, with assistance of counsel, chose not to testify at his sentencing proceeding. Apparently, he inferred from the trial judge's remarks that his testimony at that proceeding might be used against him in the guilt or innocence phase of a new trial of the case should there be one. The trial judge did not specifically advise Roberts as to that matter, and Roberts did not ask for a clarification; therefore, we cannot say the trial judge's statement was erroneous. Moreover, the defendant, with assistance of counsel, is the one to decide whether to testify at his trial. He cannot be permitted to profit from his faulty interpretation of the trial court's statement.

Appellant Roberts argues the solicitor improperly inserted his own opinion that capital punishment deters crime into his closing argument at the sentencing phase of the trial. We disagree.

"While the solicitor should prosecute vigorously, *State v. Davis*, 239 S.C. 280, 122 S.E.2d 633, his duty is not to convict a defendant but to see justice done. *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976). The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. *State v. White*, 246 S.C. 502, 144 S.E.2d 481 (1965). The trial judge is vested with a broad discretion in dealing with the propriety of the argument of the solicitor to the jury. *State v. Darden*, *supra*. Once the trial judge has allowed the argument to stand, as here, the defendant must bear the burden of demonstrating that the argument in effect denied him a fair determination of his guilt or innocence. On appeal, this Court will review the alleged impropriety of argument in the context of the entire record."

State v. Woomer, ___ S.C. ___, 284 S.E.2d 357, 359 (1981) [quoting *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335, 339 (1981)].

Viewing the argument in the context of the entire record, we find the solicitor's argument is properly within the guidelines set by this Court.

Appellant Copeland argues the trial judge erred in denying his request to instruct the jury of the actual effect of failure to reach a unanimous agreement as to punishment, and in instructing the jury that unanimity is required before a life sentence can be imposed. Copeland asserts the judge misstated the applicable law and inserted an arbitrary factor into the jury's sentencing decision by instructing "irrespective of what your verdict or recommendation is, it must be unanimous on each count, that is, your verdict or recommendation must be the verdict or recommendation of all twelve of you." Allegedly, this instruction might affect the jury's decision to impose life or death unless the jury is instructed that, in the event all cannot agree on a recommendation as to whether the death penalty should be imposed, the trial judge shall dismiss the jury and sentence the defendant to life imprisonment. We disagree.

The trial judge correctly stated the applicable law. We stated in *State v. Adams*, *supra*, at 587:

The language of [§ 16-3-20(C)] provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

There is no error present.

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Appellants next argue the trial judge's charge and written statutory instructions concerning mitigating circumstances were insufficient to alert the jurors that they could consider mitigating circumstances other than the nine statutory mitigating circumstances.

Section 16-3-20(C) of the Code requires the trial judge to instruct the jury to consider "any mitigating circumstances otherwise authorized or allowed by law and any . . . statutory . . . mitigating circumstances" The trial judge fully complied with this provision. This exception is without merit.

Appellant Copeland argues the trial court erred in failing to instruct the jury that life imprisonment means one will actually spend his life in prison. Copeland asserts the jury will consider the possibility of parole in its deliberations and the failure of the trial court to instruct the jury not to consider it injects an arbitrary factor into the trial. Again, we disagree.

The jurors were instructed to base their decisions solely upon the evidence adduced at trial and the law as instructed by the trial judge. While it is true that possibility of parole should not be considered by the jury, it is not the duty of the trial court to anticipate or speculate that jurors might consider it in their deliberations and instruct them accordingly. To do so may, in fact, inject consideration of parole into their deliberations where it may not before have been.

Appellants next argue the trial judge should have instructed the jury that they must find the death penalty is appropriate beyond a reasonable doubt. The trial judge repeatedly instructed the jurors they must find the existence of a statutory aggravating circumstance beyond a reasonable doubt before they could impose the death penalty. He further instructed the jurors that they could recommend a sentence of life imprisonment even if they found the existence of a statutory aggravating circumstance beyond a reasonable doubt. The jurors must have had the phrase "beyond a reasonable doubt" firmly etched in their minds at this point in the bifurcated trial. Surely, appellants would not have us believe a person of ordinary sensibilities would recommend imposition of the death penalty if he had a reasonable doubt that it was an appropriate sentence in that case. This exception is frivolous and without merit.

This appeal represents the sixth occasion for this Court to perform the statutory function known as "proportionality review," mandated by § 16-3-25(C) of the Code. (1977 Act No. 177, section 2, eff. June 8, 1977.) *State v. Thompson*, ___ S.C. ___, 292 S.E.2d 581, cert. denied, 102 S.Ct. 1996 (1982); *State v. Butler*, *supra*; *State v. Gilbert*, *supra*; *State v. Hyman*, *supra*; *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957 and *Roach v. South Carolina*, 444 U.S. 1026.

Appellant Copeland attacks the constitutionality of the South Carolina death penalty regime on the basis of this Court's interpretation of § 16-3-25(C) of the Code. The issue is raised in the face of the very recent holding in *State v. Thompson*, *supra*, published well before appellant's brief was filed. The issue is raised without the benefit of a petition under Supreme Court Rule 8, section 10, and amounts in our view to a "reopening of closed questions" as discussed in *State v. Truesdale*, Smith's Advance Sheets, Opinion No. 21799, filed October 19, 1982. Normally the issue would be dismissed without comment. We deem it appropriate, however, to make one final pronouncement on the proper interpretation of § 16-3-25(C) at this time.

The General Assembly of South Carolina has clearly made the policy determination that proportionality review by this Court shall be accorded capital defendants who actually receive a sentence of death. The language of § 16-3-25(C) puts three questions before this Court for review in a given case:

1. Whether sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 16-3-20, and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

It is the third inquiry which constitutes proportionality review in South Carolina. Under the statute, the task of defining "similar cases" and with it the scope of any comparative analysis is plainly and properly left to this Court. As indicated below, both the statutory language and the nature of the task give rise to perplexity. There is, after all, some logic to the view that the heinous crime is sui generis, simply beyond comparison.

A complex of federal constitutional issues has enveloped all death penalty statutes since *Furman v. Georgia*, 408 U.S. 238 (1972). This Court has taken careful note of U. S. Supreme Court decisions touching upon proportionality review, and we find in these decisions a profound tension between the requirement of individualized sentencing and the notion of comparative review. The avoidance of an arbitrary and capricious pronouncement of the death sentence has now been declared a constitutional mandate. It compels the trier of fact to make specific findings with respect to the particular circumstances of a capital crime and the individual defendant. *Bell v. Ohio*, 438 U.S. 637 (1978); *Lockett v. Ohio*, 438 U.S. 586 (1978); (*Stanislaus*) *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). In like manner, these cases encourage, while not mandating, an appellate review which accords priority to the particular and distinctive features of each defendant as well as the specific circumstances of the crime for which the death sentence has been imposed. The ultimate outcome, it is suggested by these decisions, should be the infliction of capital punishment upon only those individuals who have been culled from all other defendants by a process which highlights the unique attributes of their personalities and their crimes.

From a logical standpoint, of course, that which is unique is also incommensurable. Herein lies the conflict between particularized sentencing (and review) and the notion of comparing "similar cases." Clearly, a comparative review cannot be permitted to diminish the particularized quality of sentencing, since the latter is now an absolute command of the U. S. Constitution. By the same token, the final resolution of a given appeal, if sentence is to be affirmed, should rest upon the unique correctness of the result in the given instance rather than its coarse resemblance to other cases.

We find that the U. S. Supreme Court has implicitly recognized this tension in that it has carefully avoided imposing any model of appellate review upon the states. Most obvious is the fact that the Texas statute, scrutinized in *Jurek v. Texas*, supra, provided for no proportionality review whatever. Equally striking is the absence in either *Gregg v. Georgia*, supra, or *Proffitt v. Florida*, supra, of any language elevating comparative proportionality review to constitutional prominence. We conclude that the proper balancing of particularized and comparative review, if any, has been left to the states as an "interstitial" matter not appropriate for federal constitutional resolution. "Developments in the Law--State Constitutions," 95 *Harvard Law Review* 1324, 1356 (1982).

Aside from the problematical nature of this balancing task, there may be other grounds for the apparent reluctance of the U. S. Supreme Court to impose a single model of appellate review upon the states. Comity and diversity of state death penalty regimes present obvious difficulties, although they have not deterred rulings of sweeping effect in the past. See (*Stanislaus*) *Roberts v. Louisiana*, supra; *Woodson v. North Carolina*, supra; *Furman v. Georgia*, supra. By way of example, we note that § 16-3-25(C) of the Code, bears a strong resemblance to CA CODE ANN. § 27-2537(c) (Supp. 1975), which was challenged and discussed in *Gregg v. Georgia*, supra. The South Carolina Code, however, does not specify the "universe" of similar cases as does § 27-2537(c) of the Georgia Code. Reading *Gregg v. Georgia*, supra, along with *Proffitt v. Florida*, supra, we must conclude that the U. S. Supreme Court has elected to allow diversity among the states to continue, at least in determining the scope of any comparative review.

Encouraging diversity among the states is, of course, a practice that comports well with the basic concept of federalism. It has been explicitly approved by the U. S. Supreme Court in the very setting of criminal law. Speaking for a unanimous Court in *Addington v. Texas*, 411 U. S. 418, 431 (1979), Chief Justice Burger stated: "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced

into a common, uniform mold." In the same spirit is the "celebrated dictum" of Justice Brandeis in which the individual states were compared to laboratories of social and economic experimentation, a view taken on many occasions since it was first expressed in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion). See *Brooks v. Tennessee*, 406 U.S. 603, 617 (1972) (Burger, C.J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting); *Fay v. New York*, 332 U.S. 261, 296 (1947) (Opinion of Jackson, J.).

Imposition upon the states of a single design for proportionality review would represent a massive intrusion upon the integrity of state governments within the federal scheme. We cannot assume that the United States Supreme Court would take such a step by mere implication or inadvertence. Rather, we believe such a dramatic curtailment of state autonomy would be openly announced and most likely heralded by decisions preparing a foundation.

Neither formal announcement nor suggestive precedent reveals itself in any of the post-Furman decisions. The due process clause of the Fourteenth Amendment to the U. S. Constitution does not even require states to provide appellate review, as was indicated in *Ortwein v. Schwab*, 410 U.S. 656, 661, (1973), citing a line of prior decisions including *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *McKane v. Durston*, 153 U.S. 684 (1894). We find no suggestion that, where state appellate review is granted, the U. S. Supreme Court has mandated any particular mode of conduct, to say less of ruling any mode unconstitutional. Likewise there is no hint that the doctrine of equal protection requires comparative review at the state level. Indeed the application of an equal protection analysis would take the Supreme Court of the United States into the very process of defining "similar cases" which it has declined to enter heretofore. The existence of similarly situated persons is after all a logical precondition for denial of equal protection.

As indicated above, none of the Eighth Amendment decisions following *Gregg v. Georgia*, *supra*, have imposed or suggested a preferred method of state appellate review. In the final analysis, it appears that the U. S. Supreme Court itself looks only to the ultimate result, which is preventing the imposition of excessive and disproportionate punishment upon the individual petitioner. In *Coker v. Georgia*, 433 U.S. 584 (1977) the U. S. Supreme Court vacated a "disproportionate" sentence of death for the crime of rape. In its opinion, the Court made no mention of the Georgia appellate process. While the Court conducted a modified "proportionality review" of its own, the ultimate result was reached independently for, in the words of Justice White, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U. S. at 598. See also *Emmund v. Florida*, *supra*. Another arguably disproportionate sentence was vacated in *Godfrey v. Georgia*, 446 U.S. 420 (1980). The U. S. Supreme Court there devoted some attention to actions by the Supreme Court of Georgia. The basis of the decision, however, was not the matter of review but the overly broad reading which Georgia had given to one of its statutory aggravating circumstances. It is thus apparent that the Eighth Amendment to the U. S. Constitution does not mandate any mode of appellate review, or even appellate review as such, but only an outcome. That outcome, again, is a penalty imposed on a meaningful basis which can be sustained as neither excessive nor disproportionate in light of the crime and the defendant.

We conclude from the foregoing that the contours of proportionality review, where it exists, have been left to state determination since the U. S. Supreme Court has declined to impose any specific model of review upon the states. § 16-3-25(C) of the Code represents an act of legislative grace by the General Assembly which we are required to interpret in accordance with sound rules of statutory construction.

In our view, the search for "similar cases" can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of "similarity" consonant with our role as an appellate court.

We recognize that in some jurisdictions and commentaries it is felt that the reviewing court should compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests. Under such a regime, the reviewing court could only determine the size of its

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sample or "universe" by some arbitrary device. Fact findings of the trial court, by contrast, provide a fundamental line of demarcation well recognized in and even exalted by our legal tradition. The decisive importance of such findings is evidenced by the language of Article V, section 5, South Carolina Constitution, which limits our review to "correction of errors at law" in all but equity cases.

To expand the notion of a "universe" would also entail intolerable speculation by this Court. Under the South Carolina statute, a jury is not required to state its reasons for failing to recommend a sentence of death. In a given case, the alleged aggravating circumstance may not have been proven to the satisfaction of the jury, while in another "similar case" (expansively defined) the statutory mitigating circumstances or some mitigating factor "otherwise authorized or allowed by law" may have deterred imposition of the death sentence.

This Court would enter a realm of pure conjecture if it attempted to compare and contrast such verdicts with an actual sentence of death. They represent acts of mercy which have not yet been held to offend the United States Constitution. Moreover, they reflect the emphasis upon individualized sentencing mandated by the United States Supreme Court. We will not subject these verdicts to scrutiny in pursuit of phantom "similar cases," when a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally.

It is axiomatic, of course, that a death sentence infected by prejudicial trial error is a nullity which must be categorically rejected from any comparative review of properly imposed death sentences. Thus our prior decisions vacating and remanding death sentences for retrial must be disregarded in the course of proportionality review. *State v. Truesdale*, supra; *State v. Patterson*, Smith's Advance Sheets, Opinion No. 21788, filed September 13, 1982; *State v. James Anthony Butler*, ___ S.C. ___, 290 S.E.2d 420 (1982); *State v. Woomer*, ___ S.C. ___, 284 S.E.2d 357 (1981); *State v. Plath*, supra; *State v. Adams*, supra; *State v. Linder*, supra; *State v. Woomer*, 276 S.C. 258, 277 S.E.2d 696 (1981); *State v. Gooley*, supra; *State v. Tyner*, supra.

It is of no consequence that the South Carolina "universe" has consisted of only five cases to this date. *State v. Shaw*, supra, presented the first occasion for proportionality review under our current statute. We noted then that no similar cases existed, but the sentence imposed was none the less appropriate and neither "excessive" nor "disproportionate" considering the crime and the defendants. Indeed, a comparable crime involving multiple murder by two or more accomplices, in the course of armed robbery, kidnapping and rape, attended by unspeakable cruelty and mutilation, has yet to come before this Court. *Shaw*, thus, constitutes a category unto itself.

In like manner, the succeeding three cases of *State v. Hyman*, supra, *State v. Gilbert*, supra, and *State v. Thompson*, supra, proved "similar" in only the most superficial manner—that is, the aggravating circumstance in each instance was armed robbery. The transcripts of these cases are public records, as pointed out in *Thompson*, supra, and when inspected reveal significant differences between them.

William Gibbs Hyman conspired with four other persons to rob two elderly brothers. The conspirators made their way at nightfall to the victims' home where stealth and deception were initially employed. Failing in their first foray, the conspirators applied violence. One of the victims was able to fire a shot from within before the home was stormed. From the testimony, a jury could have concluded that the decedent was killed by a shot-gun blast fired by Hyman at close range while the victim stood disarmed. It appears that everyone at the scene was intoxicated, but the defendant was sufficiently sober to continue demanding money while he beat the surviving brother with one of the two weapons involved. Mitigating testimony was offered by a clergyman as well as family members who related personal frustrations and tensions suffered by the defendant at some time before the killing. In addition, the defendant himself took the stand to express his remorse. The jury recommended a sentence of death and we affirmed, considering the penalty neither excessive nor disproportionate with respect to the crime and the defendant and notwithstanding the lack of any truly "similar" case to that point in time.

Larry Gilbert and J. D. Gleaton, brothers of whom Gleaton is the elder, robbed and murdered the operator of a filling station shortly after noon following a morning spent cruising in their automobile in search of (and possibly using) drugs. In the course of the robbery, the victim was savagely stabbed seven times as he struggled with Gleaton and was

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shot once by Gilbert. From the testimony, a jury could have inferred that the shot was fired while the victim lay on the floor of his business establishment. A witness testified that one of the assailants laughed at the victim in his agony, which testimony was sharply contested by defendants. Mitigating testimony was taken from a clergyman and the defendants' mother. Gilbert and Gleaton in turn took the stand to state that they had acted on impulse and had intended no harm to the victim. The jury recommended death sentences, and we affirmed. The cases of *State v. Shaw*, *supra*, and *State v. Hyman*, *supra*, offered no assistance by way of comparison, particularly since the latter case had involved an elaborate, multiparty scheme to rob and the use of weapons by the robbery victims. In the crime of Gilbert and Gleaton, the deceased was unarmed and could only use his hands to ward off the repeated thrusts of the knife. We held the sentence of death to be neither excessive nor disproportionate considering the crime and the defendants.

Albert "Bo" Thompson shot and killed the proprietor of a small store in the course of a robbery. In fact the defendant shot his victim twice, the second time in the face from close range. Testimony of an accomplice indicated that the defendant, on the morning of the incident, had determined to rob someone somewhere and that one other store was reconnoitered before that of the victim was chosen. No mitigating testimony was offered, unlike the cases of Hyman, Gilbert and Gleaton. The jury was asked only to consider the defendant's age as well as a brief unsworn statement by him in the course of which he wept and asserted that the killing was an accident. Thompson's crime differed from those of Hyman, Gilbert and Gleaton in other respects, too. The latter defendants all offered some evidence of acting under the influence of alcohol or drugs, while Thompson inferably acted with a clear mind and cool deliberation. Thompson fired the fatal shots, it appears, after his accomplice left the store, whereas Hyman, Gilbert and Gleaton killed their struggling victims in the presence of others or one another. The jury could reasonably have concluded that Thompson acted alone in committing a senseless murder without even a pretext of justification. The jury recommended a sentence of death and, notwithstanding the lack of a truly "similar" case for guidance, this Court found the sentence neither excessive nor disproportionate with respect to the crime and the defendant. In the course of proportionality review, this Court examines the record through the eyes of the sentencing authority. In the case of Thompson, however, this Court could not avoid noting that we had previously affirmed his conviction for an armed robbery occurring subsequent to this murder, one in which the defendant had again held a gun to the head of the robbery victim. *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981). At trial the State had no opportunity to offer this conviction in evidence, yet it clearly would have rebutted mitigating arguments under § 16-3-20(C)(b)(1) of the Code. We do not consider it amiss to recognize such information regarding an appellant in the course of our final proportionality review.

The remaining case of *State v. Horace Butler*, *supra*, involved the abduction, rape and murder of an eighteen-year-old girl as she left her place of employment after dark. The defendant offered his poor record in school, his youth, and the fact that he had a small child as mitigating evidence. We affirmed the conclusion of the jury that a sentence of death was neither excessive nor disproportionate in light of the defendant's character and his wanton crime. No truly "similar" case existed for comparison, and by the same token *State v. Butler*, *supra*, offers no guidance in the review of the instant appeal.

Unlike previous cases involving murder and armed robbery, this appeal arises from two separate atrocities occurring in a single night. Unlike Hyman, Gilbert, Gleaton and Thompson, appellants Copeland and Roberts were not content to terrorize and slay their victims where they found them but instead transported them to backroads execution sites. Two of the victims were brought down by gunfire as they sought to escape. Thus wounded, they were subsequently riddled with bullets as they lay on the ground. On the body of one, a series of post-mortem stab wounds was also inflicted.

Mitigating evidence for appellant Copeland was limited to the testimony of his former wife who vouched for the promptness of his alimony and child support payments. She also stated that she had never seen him do anything cruel. More extensive mitigating testimony was offered on behalf of appellant Roberts. Family members as well as a trained psychologist revealed that Roberts had suffered an unhappy childhood, problems in school, the recent traumatic slaying of a brother, drug abuse and injuries in fights and car accidents. Roberts was characterized as having an impulsive personality and being easily led by others. By way of the trial court's charge to the jury, Roberts received the full benefit of the relevant statutory mitigating circumstances. In the end it is probable that the jury relied on the psychologist's own statement that Roberts' prognosis for "straightening up" was poor.

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It is our conclusion that no "similar" case exists that would permit meaningful comparative review of these death sentences. In view of the facts set forth above, however, we are satisfied that the sentence of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters. The sentences are accordingly affirmed.

It should now be clear that proportionality review in South Carolina is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. Comparative review will be thereafter undertaken if possible. Without hazarding a prediction, we can imagine that the "universe" of similar cases will gradually expand in the fullness of time. At present, South Carolina has found the death penalty to be neither excessive nor disproportionate in six distinct cases: (1) where one or more defendants rob, abduct, rape and murder one or more victims in circumstances which starkly reveal the malignant character of the defendant or defendants; (2) where a victim, armed and defending himself, is slain by an intruding defendant who is himself armed (and possibly intoxicated) while engaged in robbing the deceased; (3) where two or more defendants, on impulse or even while intoxicated rob and murder an unarmed struggling victim in his place of business; (4) where a single defendant, alone with an unarmed and unresisting victim, robs and without mitigation whatever murders the deceased; (5) where a single defendant kidnaps, rapes and murders a victim; (6) where one or more defendants perpetrate multiple offenses by robbing, kidnapping and murdering one or more victims in each separate incident. As comparable cases arise, they will be reviewed against this background. As dissimilar circumstances may lead to affirmed sentences of death, new "classes" or types of capital cases will be added to the existing "pool."

In the foregoing construction of § 16-3-25(C) of the Code, this Court has paid particular attention to the reasoning adopted by three members of the U. S. Supreme Court, speaking through Justice White, in *Gregg v. Georgia*, *supra*. As he understood the proportionality function, it was to serve as a mechanism to monitor imposition of death sentences within "classes" or "types" of crimes, those "classes" and "types" being determined by the statutory aggravating circumstances in a given state scheme. 428 U.S. at 223-224. In a concluding passage, Justice White in essence stated the philosophy underlying our definition of "similarity" as he answered complaints that the Georgia statute permitted unconstitutional acts of discretion:

Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.

§ 16-3-910 of the Code provides that one shall suffer the punishment of life imprisonment for kidnapping unless sentenced for murder as provided in § 16-3-20. Since appellants were sentenced for murder, as provided in § 16-3-20, their sentences of life imprisonment for kidnapping are vacated. Their convictions and sentences are otherwise affirmed. A search of the entire record reveals no other error.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, NESS and HARWELL, JJ., concur.

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. _____

H. WESLEY COPELAND,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

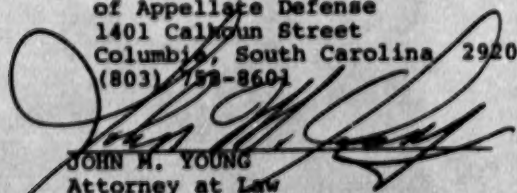
Petitioner, H. Wesley Copeland, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully submitted,


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ATTORNEYS FOR PETITIONER.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. _____

H. WESLEY COPELAND,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF H. WESLEY COPELAND
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, H. Wesley Copeland, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1980

450.00 A W K.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NO

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

H. Wesley Copeland
H. Wesley Copeland

SWORN TO and subscribed before me
this 3rd day of Feb., 1983.

Thomas Oliver
Notary Public for South Carolina

My Commission Expires: 4-26-89.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. _____

H. WESLEY COPELAND,

PETITIONER,


v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I hereby certify that on this 7th day of February, 1983, I served three (3) copies of the Petition for Writ of Certiorari in the above-captioned case, together with one (1) copy of petitioner's Motion for Leave to Proceed in Forma Pauperis, be depositing the same, postage prepaid, in the United States mail addressed to Senior Assistant Attorney General Brian P. Gibbes, Office of the Attorney General, State of South Carolina, P. O. Box 11549, Columbia, South Carolina 29211. I further certify that all parties required to be served have been so served.


TARA D. SHURLING

Counsel for Petitioner.

1401 Calhoun Street
Columbia, S. C. 29201
(803)758-8601

SWORN TO AND SUBSCRIBED before me
this 7th day of February, 1983.


Notary Public for the State of South Carolina
My Commission expires 9-29, 1986